LATHAM & WATKINS
ATTORNEYS AT LAW
1001 PENNSYLVANIA AVE., N.W.
SUITE 1300
WASHINGTON, D.C. 20004-2505
TELEPHONE (202) 637-2200
FAX (202) 637-2201

PAUL R. WATKINS (1899-1973)
DANA LATHAM (1898-1974)

CHICAGO OFFICE
SEARS TOWER, SUITE 5800
CHICAGO, ILLINOIS 60606
TELEPHONE (312) 876-7700
FAX (312) 993-9767

HONG KONG OFFICE
23RD FLOOR
STANDARD CHARTERED BANK BUILDING
4 DES VOEUX ROAD CENTRAL, HONG KONG
TELEPHONE + 852-2905-6400
FAX + 852-2905-6940

LONDON OFFICE
ONE ANGEL COURT
LONDON EC2R 7HJ ENGLAND
TELEPHONE + 44-171-374 4444
FAX + 44-171-374 4460

LOS ANGELES OFFICE
633 WEST FIFTH STREET, SUITE 4000
LOS ANGELES, CALIFORNIA 90071-2007
TELEPHONE (213) 485-1234
FAX (213) 891-8763

MOSCOW OFFICE
113/1 LENINSKY PROSPECT, SUITE C200
MOSCOW, RUSSIA 117198
TELEPHONE + 7-503 956-5555
FAX + 7-503 956-5556

NEW JERSEY OFFICE
[illegible] CENTER
NEWARK, NEW JERSEY 07101-3174
TELEPHONE (201) 639-1234
FAX (201) 639-7298

NEW YORK OFFICE
885 THIRD AVENUE, SUITE 1000
NEW YORK, NEW YORK 10022-4802
TELEPHONE (212) 906-1200
FAX (212) 751-4864

ORANGE COUNTY OFFICE
650 TOWN CENTER DRIVE, SUITE 2000
COSTA MESA, CALIFORNIA 92626-1925
TELEPHONE (714) 540-1235
FAX (714) 755-8290

SAN DIEGO OFFICE
701 "B" STREET, SUITE 2100
SAN DIEGO, CALIFORNIA 92101-8197
TELEPHONE (619) 236-1234
FAX (619) 696-7419

SAN FRANCISCO OFFICE
505 MONTGOMERY STREET, SUITE 1900
SAN FRANCISCO, CALIFORNIA 94111-2562
TELEPHONE (415) 391-0600
FAX (415) 395-8095

TOKYO OFFICE
INFINI AKASAKA, MINATO-KU
TOKYO 107, JAPAN
TELEPHONE +813-3423-3970
FAX +813-3423-3971

DOCKET FILE COPY ORIGINAL

RECEIVED
JUL 30 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 30, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CMRS Safeguards Processing, WT Docket No. 96-162

Dear Mr. Caton:

As the Commission continues to study the proper regulatory environment governing LEC provision of CMRS, the Independent Telephone and Telecommunications Alliance ("ITTA") demonstrates why the Court's holding in *Cincinnati Bell*[1] demands that the Commission not place additional regulatory safeguards (beyond those which the Commission currently has in place) on mid-sized LECs that offer CMRS. Such additional safeguards not only are not grounded in the Telecommunications Act of 1996, but are unnecessary to safeguard the public interest.

When Congress enacted the 1996 Act, it expressly rejected a "one-size fits all" approach to regulating LECs in favor of flexibility that considers the unique needs of mid-sized and rural LECs as compared to their larger competitors. For this reason, Congress established a tri-partite regulatory framework for rural, mid-sized, and large local telephone companies based upon their relative positions in the marketplace and their ability (or inability) to adversely affect

1 *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995) ("*Cincinnati Bell*").

No. of Copies rec'd 0+2
List ABCDE

competition. Specifically, mid-sized LECs, those with less than two percent of the Nation's access lines, may have different interconnection obligations than those of the largest LECs.[2] Indeed Congress recognized that mid-sized LECs may be afforded special treatment in light of their limited resources as compared to the largest LECs, cable MSOs and interexchange companies against which they compete.[3] Thus, the Commission has the necessary statutory authority by which to differentiate among different-sized LECs.

The Commission should not disregard this tri-partite regulatory structure as it considers whether additional safeguards should be placed on mid-sized LECs that offer CMRS. Indeed, the Commission should embrace the two percent standard as the statutory justification to differentiate its treatment of LECs and their offering of CMRS services. Expressly embracing the two percent distinction would avoid any risk that an alternative -- *i.e.*, naming specific companies that would be subject to regulation -- would run.[4] Specifically, there is no evidence in the record that, over the course of the past 15 years, mid-sized LECs have abused their former statutory monopoly in their offering of CMRS that would justify imposition of additional safeguards, such as separate affiliate requirements. Indeed, mid-sized LECs generally have neither the incentive nor the ability to discriminate against other mobile service providers, regardless of whether they are affiliated with a carrier, because mid-sized companies, as a result of their smaller and disparate exchange service territories, are dependent upon other LECs and IXCs for interconnection and transmission of their mobile traffic.

Moreover, regulating mid-sized LECs differently than the largest LECs is completely consistent with the Court's holding in *Cincinnati Bell*. In that case, the Court determined that the Commission should justify why it regulated Bell Company offering of cellular services differently than their offering of PCS because the two services are sufficiently similar to warrant similar regulatory treatment.[5] Thus, the Court remanded the case so that the Commission would regulate similar services (PCS and cellular) similarly. The Court expressly did not require the Commission to regulate *dissimilar* LECs similarly when they offer similar services. In fact, it has been a cornerstone of the Commission's regulatory policies for decades to treat different-sized LECs differently.

---

2 *See* 47 U.S.C. § 251(f)(2).

3 In a similar vein, ITTA notes that where the size and scope of a local exchange monopoly presented competitive concerns in an adjacent market, Congress expressly enacted a safeguard requirement. *See* 47 U.S.C. § 272. Consequently, the validity of the two percent line demarcation is supported not only explicitly by virtue of the direct reference in Section 251(f)(2), but also implicitly by virtue of the limited application of Section 272 safeguards to the Bell Operating companies, and not other LECs.

4 *See e.g.*, SBC Communications challenge of Sections 271 et. seq. of the 1996 Act.

5 *Cincinnati Bell,* 69 F.3d at 767.

Any new test that the Commission develops (*i.e.*, such as an overlap test between a LEC's local exchange and CMRS territories of a certain amount that would be need to be met before imposing new safeguards) must bear a relationship to the ability of the Company to engage in the prohibited conduct. For example, the Court in *Cincinnati Bell* remanded the Commission's decision to use a 20 percent cellular attribution standard in the cellular-PCS cross-ownership rule because the Commission had not justified why that particular attribution standard was necessary to prevent an entity from engaging in the anti-competitive behavior identified.[6]

For example, a test that involves a 10 percent overlap of the POPs in a LEC's CMRS service territory with that LEC's local exchange territory test would not be able adequately to distinguish cases where a LEC would be able to exercise bottleneck control over a larger, overlapping CMRS territory because it is unlikely that a CMRS provider would directly interconnect with any LEC serving a small portion of the CMRS territory.[7] The Commission has laid no foundation for determining at what point, if any, overlapping LEC and CMRS territories might lead to a greater risk of anti-competitive behavior among CMRS providers. Thus, there is no relationship between the test for imposing new regulations and the ability of the Company to engage in the prohibited conduct. Moreover, an overlap test does not take into account either the mobile nature of CMRS (as opposed to the static nature of local exchange service) or the types of territories in question – high-volume urban areas that account for a disproportionate amount of traffic versus the outlying, largely rural, low-volume territories typically served by mid-sized LECs.

An overlap test also would perpetuate the same inequity of the current proposed cutoff (*i.e.*, only Tier 1 companies would be subject to new regulatory requirements) and would result in inconsistent application of the safeguard requirements within the various CMRS territories of the same company. This would affect, among other things, companies' strategic plans. For example, transactions involving either the purchase or sale of CMRS or LEC service territories, even if only involving a minor portion of the company's overall service territories, could well entail a change in regulatory status for part of the company's operations. The recent purchase of Pacific Telecom by Century Telephone Enterprises, combining disparate service areas 21 states, is a real example where an overlap test would require a great deal of analysis to

---

6 *Id.* at 759.

7 In addition, cellular markets are MSA-based, whereas A- and B-Block PCS systems are based on much larger MTA-sized territories. Consequently, a small local exchange territory would have a relatively larger overlap of an MSA, without significantly overlapping a MTA-based PCS system. Thus, safeguards might again be imposed based upon the specific CMRS in which the LECs was licensed as opposed to any legitimate competitive concern. This is the same problem encountered and remanded by the Court in *Cincinnati Bell*.

determine whether or in which jurisdictions such a transaction might trigger additional regulatory safeguards.

The Commission's "predictive judgment" must recognize that the record before the Commission is bereft of evidence that, in the 15 years that mid-sized LECs have offered CMRS without a separate affiliate requirement, they have ever abused their former statutory local exchange monopoly in their provision of CMRS.[8] Similarly, the Commission's judgment must take into account the additional protections afforded all telecommunications carriers under the 1996 Act. Indeed, even if the Commission were to base its rule on its "predictive judgment" as to possible future behavior, the "real world" absence of any incentive to discriminate in conjunction with the fact that every mid-sized LEC has entered into at least one non-discriminatory interconnection agreement with other CMRS providers so that these providers have access to the mid-sized LEC's local facilities, should be considered as evidence that new safeguards, such as a separate affiliate requirement, are unnecessary to protect the public interest. In sum, there is no need to fix something that is not broken.

If you have any questions concerning these matters, please contact me at (202) 637-2147.

Sincerely,

Michael S. Wroblewski

Michael S. Wroblewski

cc: Jackie Chorney
Rudy Baca
David Siddall
Suzanne Toller
Regina Keeney
William Kennard
Daniel Phythyon
Karen Gulick
Donald Stockdale
Michael Riordan
John Nakahata
David Furth
Jane Halprin

---

[8] *Cincinnati Bell,* 69 F.3d at 760.